

FILED

FEB 16 2006

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HAMDI SALEH,

Defendant - Appellant.

No. 04-50253

D.C. No. CR-00-00310-DDP-01

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
Dean D. Pregerson, District Judge, Presiding

Submitted February 13, 2006^{**}

Before: FERNANDEZ, RYMER, and BYBEE, Circuit Judges.

Hamdi Saleh appeals from the 96-month sentence imposed following his guilty-plea conviction for use of a communication facility to facilitate a felony

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

narcotics offense, in violation of 21 U.S.C. § 843(b). We have jurisdiction pursuant to 28 U.S.C. § 1291.

As a preliminary matter, we decline to enforce the appeal waiver contained in Saleh's written plea agreement because, at the change of plea hearing, the district court advised Saleh that he could appeal his sentence if it was contrary to law. *See United States v. Buchanan*, 59 F.3d 914, 917-18 (9th Cir. 1995) (“[W]here there is a direct conflict between a trial judge's unambiguous oral pronouncement of sentence and the written judgment, the oral pronouncement must control, even if erroneous.”).

Citing *United States v. Booker*, 125 S. Ct. 738 (2005), Saleh contends that the district court ran afoul of the Sixth Amendment when it applied a two-level enhancement based on its conclusion that Saleh had obstructed justice. Because Saleh's ultimate sentence did not exceed that which could have been imposed based solely on the facts he admitted in the plea agreement, there was no constitutional error. *See id.* at 756.

AFFIRMED.